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Supreme Court, U.S.
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No. 08-1366

In the
SUPREME COURT of the UNITED STATES

JOHN P.W. ROSCH

Petitioner,

v.

WHATCOM COUNTY, WASHINGTON,

Respondents.

On Petition for Writ of Certiorari
to the Court of Appeals of the State of Washington

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM JOHNSTON
Counsel of Record
401 Central Avenue
Bellingham, WA 98225
(360) 676-1931

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES..... ii

ARGUMENT

I. Rosch did not waive his constitutional challenge..... 1

II. The benefit to the sheriff is substantial, not attenuated and remote as Whatcom County claims..... 5

III. The Washington Court of Appeals decision conflicts with *Coolidge v. New Hampshire* by allowing a law enforcement official to exercise judicial power in a quasi criminal matter..... 8

TABLE OF AUTHORITIES

Page(s)

CASES

Agomo v. Fenty,
916 A.2d 181 (D.C. 2007).....7

Alpha Epsilon Phi Tau Chapter Housing Association v. City of Berkeley, 114 F.3d 840 (9th Cir. 1997).....7, 8

Boyd v. United States,
116 U.S. 616, 6 S.Ct. 524 (1886).....10, 11

Commonwealth of Northern Mariana Islands v. Kaipat, 94 F.3d 574 (9th Cir. 1996).....7

Coolidge v. New Hampshire,
403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).....1, 4, 8, 9, 11, 12

Dugan v. Ohio,
277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784 (1928).....6, 7, 8

Freytag v. Commissioner of Internal Revenue,
501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991).....2

Gete v. Immigration and Naturalization Service
121 F.3d 1285 (9th Cir. 1997)..... 3

Johnson v. United States
333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).....11, 12

North v. Russell
427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976)..... 4, 8

One 1958 Plymouth Sedan v. Pennsylvania,
380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965).....10, 11

Stewart v. LaGrand
526 U.S. 115, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999)..... 3

Valerio v. Lacey Police Department,
110 Wash.App. 163, 39 P.3d 332 (2002).....11

Ward v. Monroeville,
409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972).....4, 6, 7, 8, 12

CONSTITUTION, STATUTES AND REGULATIONS

RCW 34.04.....1
RCW 69.50.505.....*passim*
U.S. Const. amend V.....*passim*
U.S. Const. amend XIV.....10

OTHER PUBLICATIONS

Plucknett, Theodore Frank Thomas, "A Concise History of the Common Law (Fifth Edition)." Boston: Little, Brown and Company, 1956.....10

ARGUMENT

Petitioner John P.W. Rosch makes the following reply to Respondent's Brief in Opposition to show that he did not waive his constitutional challenge; that the sheriff has a direct substantial interest in the outcome of a forfeiture hearing; and that Washington courts have acted contrary to *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L. Ed.2d 564 (1971) by authorizing a law enforcement officer to exercise judicial power in a quasi-criminal matter.

I. Rosch did not waive his constitutional challenge.

The notice of forfeiture sent by the sheriff advised Rosch that he was entitled to "a reasonable opportunity to be heard" as to a claim of ownership or right of possession.

> The hearing shall be before William J. Elfo, the chief law enforcement officer of Whatcom County, Washington, or his designate, except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction if the aggregate value of the article or articles seized is more than five hundred dollars ($500). A hearing before said chief law enforcement officer and any appeal therefrom shall be under chapter 34.04 RCW.

Notice of Seizure and Forfeiture, July 12, 2005.

Washington courts hold that Rosch waived his due process challenge when he chose to proceed in the sheriff's court instead of exercising the removal option. They have steadfastly refused to decide whether the sheriff's court can withstand scrutiny under the Due Process Clause.

The first case Whatcom County cites to support waiver, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), actually shows why there was no waiver in this case. In *Freytag*, the Chief Judge of the United States Tax Court assigned a "special trial judge" to hear the petitioners' case. The special judge disallowed petitioners' claimed deductions. On appeal, petitioners argued that the appointment of the special judge was invalid under the Appointments Clause. The Court of Appeals concluded that petitioners had waived this constitutional challenge by going to trial before the special judge. *Freytag*, 501 U.S. at 872. The majority opinion for this Court, however, decided on the merits that there was no violation of the Appointments Clause. Similarly here, the constitutional defect alleged by Rosch should be thoroughly reviewed and a decision reached on the merits whether or not Washington's unique forfeiture court comports with due process.

Justice Scalia's concurring opinion would have held that that the *Freytag* petitioners waived their constitutional challenge. But his analysis supports Rosch in the present case. He recognized that an unlawful proceeding cannot be legitimized by consent when the defect goes "to the validity of the very proceeding under review". *Freytag*, 501 U.S. at

898 (SCALIA, J., concurring). To ignore Rosch's due process argument on the basis of waiver gives the purported waiver a legitimating effect upon an illegitimate system. Whenever the sheriff's decision to forfeit is appealed to the courts of Washington, under the statute their review is deferential rather than de novo. It is an affront to legitimate courts to require them to accept findings of fact that are supported by substantial evidence in the record, where the decisionmaker who made the findings is acting as a judge in his own case. Certiorari should be granted to protect the integrity of the court.

The second case Whatcom County cites for waiver is *Stewart v. LaGrand*, 526 U.S. 115, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999). Mr. LaGrand chose to be executed by lethal gas rather than lethal injection with full knowledge and advice of counsel concerning the import of that choice, and after the governor offered him an opportunity to rescind his decision and select lethal injection, and at no cost to himself if he chose lethal injection. The Court held that he thereby waived the right to challenge the constitutionality of execution by lethal gas. *Stewart*, 526 U.S. at 119. *Stewart* is factually and procedurally remote as it does not involve a challenge to the legitimacy of a tribunal. An uncounseled election to participate in a hearing before a systematically biased judge does not meet the standard for waiver of a fundamental right. *See Gete v. Immigration and Naturalization Service*, 121 F.3d 1285, 1294 (9th Cir. 1997).

Under the Due Process Clause, judicial power must be exercised by an impartial decisionmaker from the very beginning. *Ward v. Monroeville,* 409 U.S. 57, 61-62, 93 S.Ct. 80, 34 L.Ed.2d 267 ("Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.")

The fundamental importance of an unbiased decisionmaker is underscored by *North v. Russell,* 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976). There, this Court upheld against a due process challenge a Kentucky two-tier trial court system for misdemeanors, with lay judicial officers in the first tier in smaller cities and an appeal of right with a de novo trial before a traditionally law-trained judge in the second. *North*, 427 U.S. at 339. The Court explained that the use of a nonjudicial officer as judge did not violate *Ward* unless it created the potential for bias. "Our concern in prior cases with judicial functions being performed by nonjudicial officers has also been directed at the need for independent, neutral, and detached judgment, not at legal training." *North*, 427 U.S. at 337, also citing, *inter alia*, *Coolidge v. New Hampshire*, 403 U.S. at 449-453.

The Washington statute does not require the sheriff or his designee to be law-trained, but Rosch does not attack the sheriff's court on that basis. As *North* indicates, unfamiliarity with the law is a lesser flaw compared to the problem of systemic bias.

This Court should reject the application of the waiver principle by which Washington's appellate courts have long avoided confronting the fundamental unfairness of allowing an interested law enforcement official to decide a forfeiture case.

II. The benefit to the sheriff is substantial, not attenuated as Whatcom County claims.

Whatcom County's brief inaccurately defines Rosch's declaratory judgment claim as "premised upon the unconstitutionality of Washington's forfeiture statute *as applied within Whatcom County*." Respondent's Brief in Opposition, pages 2-3 (emphasis added). Whatcom County then makes irrelevant assertions about how the statute is applied locally, apparently attempting to show that a local "administrative process" has cured the deficiencies in the statute. See Respondent's Brief in Opposition at 4-5, 9-14.

Whatcom County cites no statute, ordinance or case that requires the sheriff to involve the prosecutor or the court in a process to decide who gets the proceeds of forfeiture. If the Whatcom County Sheriff has volunteered to share his power at present, he has created only a veneer of neutrality. Nothing prevents the sheriff from reverting at any time to his statutory authority to retain the forfeited property "for official use" or sell it and keep 90% of the proceeds, without the intermediation or approval of any other entity. It is this statutory authority that gives the sheriff as a seizing agency a direct and unattenuated institutional interest in forfeited assets and proceeds. The superior court and the appellate courts of Washington have not mentioned

local practice as a basis for upholding RCW 69.50.505. They have recognized Rosch's challenge as a challenge to the statute on its face and that is what it is.

Whatcom County does not dispute Rosch's historical point that the reforms of Henry I and Henry II presaged the modern due process requirement for an impartial decisionmaker. And Whatcom County does not dispute that Washington State is the only State with a forfeiture hearing process in which the chief law enforcement officer of the seizing agency is the adjudicator. The sheriff who adjudicates forfeiture hearings under RCW 69.50.505 may hear any case that he initiates, whether it involves a forfeiture of $12.00 or $1.2 million. Whatcom County attempts to disguise the interest of the sheriff by emphasizing that it was his designee, the undersheriff, who actually conducted the forfeiture hearing in Rosch's case. This is a distinction without a difference. Again, it is not necessary under the statute that the sheriff designate someone other than himself; and even if it were, there is no reason to believe that the undersheriff—who serves at the pleasure of the sheriff—is less subject to the temptations of forfeiture than the sheriff himself would be.

The temptation is systemic under the statute. This situation is governed by *Ward*, not—as Whatcom County argues—by *Dugan v. Ohio*, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784 (1928). In *Dugan*, the mayor of the town had judicial functions but "only very limited executive authority," *Ward*, 409 U.S. at 60, whereas here the sheriff is the chief county law enforcement official, with full authority

to enforce the laws regarding controlled substances. Just as the Monroeville mayor's "executive responsibilities for village finances" could make him "partisan to maintain the high level of contribution from the mayor's court", *Ward*, 409 U.S. at 60, the sheriff's accountability for enforcement of drug laws gives him a direct interest in augmenting his budget with vehicles and cash and other forfeited items of personal property.

Whatcom County contends the sheriff's motive to augment his budget is de minimis, citing *Alpha Epsilon Phi Tau Chapter Housing Association v. City of Berkeley*, 114 F.3d 840 (9th Cir. 1997); *Commonwealth of Northern Mariana Islands v. Kaipat*, 94 F.3d 574 (9th Cir. 1996); and *Agomo v. Fenty*, 916 A.2d 181 (D.C. 2007) as authority for upholding Washington's statute. *Kaipat* and *Agomo* are not compelling because they address systems like the one in *Dugan*, in which the allegedly biased decisionmaker had only judicial duties, and no executive responsibilities. *Kaipat*, 94 F. 3d at 580-81; *Agomo*, 916 A. 2d at 196-97.

City of Berkeley is closer in that, as the court recognized at the outset, the Berkeley Rent Stabilization Board "wears two hats." *City of Berkeley*, 114 F. 3d at 842. The Board was collecting a per-unit fee of up to $130 from covered units to fund its annual expenses, and was also adjudicating disputes about which units were covered. Recognizing that this budgetary system gave the Board at least some incentive to find landlords covered, the court made the judgment that the incentive was not strong because the Board had the ability to recoup losses by raising fees; adjudications

of coverage issues were rare; and the Board regularly waived penalties and had recently run a surplus. *City of Berkeley*, 114 F. 3d at 847. Similar facts are not present here. And Washington's system has a feature not present in *City of Berkeley*, *Dugan*, and other cases involving relatively small fines or fees. The item forfeited by the sheriff in any single case may be extremely valuable, such as a vehicle that the sheriff's office can put to immediate official use, or such as the cash that may be obtained by selling it. Rosch's truck had a value of approximately $15,000 and it is not unusual for the sheriff to seize items of much greater value. Such a case presents a strong temptation to the decisionmaker to put the interests of law enforcement ahead of the rights of the claimant.

III. The Washington Court of Appeals decision conflicts with *Coolidge v. New Hampshire* by allowing a law enforcement official to exercise judicial power in a quasi-criminal matter.

Whatcom County misunderstands Rosch's *Coolidge* argument. Rosch is not asking this Court to make the separation of powers doctrine applicable to the states. Rosch made *Coolidge* the focus of a separate argument in his petition in order to show that the due process requirement of an impartial decision-maker is especially imperative when it is a law enforcement official who purports to act with judicial impartiality in a criminal or quasi-criminal matter. This Court recognized *Coolidge* as a due process precedent when citing it along with *Ward* in *North*, 427 U.S. at 337.

Whatcom County contends that *Coolidge* is irrelevant because the issue here does not involve the issuance of a search warrant. *Coolidge* cannot be so easily confined to its facts. There, the State argued that the Attorney General actually did act as a neutral and detached magistrate when he made a determination of probable cause and issued a search warrant, as a state law authorized him to do. To this proposition, the Court said,

> [I]t is enough to answer that there could hardly be a more appropriate setting than this for a per se rule of disqualification rather than a case-by-case evaluation of all the circumstances. Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprise' that must rightly engage their single-minded attention.

Coolidge, 403 U.S. at 450.

Coolidge keeps all executive law enforcement officers out of the business of performing judicial functions in the criminal cases they are pursuing. Rosch argues that the bright line per se rule of disqualification in *Coolidge* should also apply to bar adjudication of forfeitures by law enforcement

officers. Forfeiture has been recognized as a criminal "plea of the crown" at least since the Assize of Clarendon (1166), which

> laid down the principle that persons indicted could be tried by the King alone, and that the forfeitures were his only. The indictment procedure therefore superseded *all local jurisdictions* both in the matter of trial and of profits.

Plucknett, Theodore Frank Thomas, "A Concise History of the Common Law (Fifth Edition)," at 428. Boston: Little, Brown and Company, 1956 (emphasis added).

The zenith of prosecutorial power is reached in cases in which the state carries on a criminal prosecution while it simultaneously seizes the accused's assets and subjects them to forfeiture. The purpose of the power of forfeiture is to punish the offender for his commission of the criminal act. That forfeiture proceedings are considered quasi criminal proceedings was established in *Boyd v. United States* 116 U.S. 616, 634, 6 S.Ct. 524 (1886); and that the exclusionary rule is binding upon the states under the Fourteenth Amendment was emphasized by the Court in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965):

> We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses

> committed by him, though they may be civil in form, are in their nature criminal... As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution.

One 1958 Plymouth Sedan, quoting *Boyd,* 380 U.S. at 697-98.

In cases involving forfeiture of personal property under the Washington statute, the seizing agency has the initial burden of showing probable cause to believe the seized items were the proceeds of or intended to be used in illegal drug activities. The adjudicator must then decide whether the agency has met that burden. *Valerio v. Lacey Police Department,* 110 Wash.App. 163, 176, 39 P.3d 332 (2002). It is fundamentally unfair to put the sheriff in the position of judging whether his own agency's evidence has met the standard for probable cause.

As this Court commented in *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367 (1948), and repeated in *Coolidge*:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in

> requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Coolidge v. New Hampshire, quoting *Johnson*, 403 U.S. at 449.

Just as the Attorney General in New Hampshire was barred from exercising judicial power to find probable cause to support the issuance of a search warrant, so too should the sheriff be barred from exercising judicial power to find probable cause to support the forfeiture of property. And this would be necessary even if the statute did not allow the sheriff to retain any of the forfeited assets or funds for official use. Thus, *Coolidge* supplies a basis for review that is distinct from *Ward*.

Rosch intends no personal disrespect to Whatcom County Sheriff Bill Elfo or to his designee. The point is, however, that forfeiture is a quasi-criminal proceeding that helps the sheriff accomplish the objectives of his law enforcement mission. He cannot reasonably be expected to be neutral and

detached. The sheriff's participation in the competitive enterprise of ferreting out crime is another reason, in addition to the financial interest created by the statute, why there should be a per se rule preventing him from adjudicating forfeitures under RCW 69.50.505.

Respectfully submitted.

WILLIAM JOHNSTON
Counsel of Record
401 Central Avenue
Bellingham, WA 98225
(360) 676-1931